Supreme Court, U.S.
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No. 90-1342

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

IMMIGRATION & NATURALIZATION SERVICE,
Petitioner,

v.

JAIRO JONATHAN ELIAS ZACARIAS,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

JAMES E. COLEMAN, JR.
PETER A. VON MEHREN *
NANCY L. MANZER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Counsel for Respondent
* Counsel of Record

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to second-guess the Ninth Circuit's factual determination that left-wing guerrillas had political motives for threatening Jairo Jonathan Elias-Zacarias when he refused to join their movement to overthrow the Guatemalan government?

2. Should this Court grant certiorari when, contrary to what petitioner claims, there is no conflict between the circuits with respect to whether threats of forced recruitment by a guerrilla group can constitute persecution "on account of . . . political opinion" for the purposes of 8 U.S.C. § 1101(a)(42) (1988)?

PARTIES TO THE PROCEEDING

Respondent adopts petitioner's statement concerning the parties to this proceeding.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Jairo Jonathan Elias-Zacarias respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The text of the Ninth Circuit's opinion is reproduced at Appendix A to the petitioner's brief. The opinion of the Board of Immigration Appeals and the oral opinion of the Immigration Judge are found at Petitioner's Appendices C and F. The record of the hearing before the Immigration Judge is set out in the Appendix to this brief.

STATEMENT

Petitioner asks the Court to review a decision by a unanimous panel of the Ninth Circuit which reversed the Board of Immigration Appeals' (the "BIA") determina-

tion that Mr. Elias-Zacarias had not established an entitlement to refugee status under 8 U.S.C. § 1101(a)(42)(1988). The Ninth Circuit found that the evidence at Elias-Zacarias' hearing before the Immigration Judge established that there was a "reasonable possibility" that a left-wing guerrilla group would carry out its threat to "take Elias by force" if he did not voluntarily join its political movement. Petitioner's Appendix at 18a (hereinafter, Pet. App.). Consequently, the court of appeals ruled that Elias-Zacarias had presented evidence satisfying the statutory requirement for refugee status, and it remanded the case to the BIA to exercise its discretion with respect to Elias-Zacarias' application for asylum. *Id.* at 25a.

While complaining about the manner in which the Ninth Circuit applied the substantial evidence test,[1] petitioner does not seriously challenge the conclusion by the panel that Elias-Zacarias' refusal to join the guerrillas was an expression of political opinion. Nor does petitioner contest the finding that the evidence established a "reasonable possibility" that the guerrillas would kidnap or kill Elias-Zacarias because he refused to join their revolutionary movement.[2]

Instead, petitioner contends that it was inappropriate for the Ninth Circuit to infer from the undisputed circumstances surrounding the confrontation between the

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[1] Under the substantial evidence test, the court reviews the BIA's factual findings and reverses if they are not substantially reasonable. *See, e.g., Artiga Turcios v. INS*, 829 F.2d 723 (9th Cir. 1987).

[2] In this regard, the State Department has reported that, in 1989, Guatemalan guerrillas "were involved in extrajudicial killing in rural areas," and among those killed were "two repatriated refugees." Department of State, *Country Reports On Human Rights Practices for 1989*, 101st Cong., 2d Sess. 599 (Joint Comm. Print 1990).

guerrillas and Elias-Zacarias that the guerrillas' threats were "on account of . . . political opinion."[3] Petitioner's Brief at 8-9 (hereinafter, Pet. Br.). In this regard, petitioner argues that the Ninth Circuit was wrong when it found that the guerrillas had political motives for threatening Elias-Zacarias; petitioner suggests that the evidence presented to the Immigration Judge showed that the guerrillas were merely seeking to conscript him into "their army" so that he could "fight for them." Pet. Br. at 2-3.

In support of this pristine interpretation of the facts, petitioner states that both the Immigration Judge and the BIA held that threats of forced recruitment by guerrillas do not constitute persecution on account of political opinion. The facts are to the contrary: neither the Immigration Judge nor the BIA ever reached such a conclusion. Petitioner also tries to posit a conflict between the Ninth Circuit and Eleventh Circuit, arguing that these two circuits have enunciated different standards with respect to what facts must be shown in order to establish persecution in a case involving threats by a guerrilla group. Pet. Br. at 9-10. A review of the decisions from these circuits demonstrates that no such conflict actually exists.

Elias-Zacarias' Undisputed Testimony. At the hearing before the Immigration Judge, Elias-Zacarias testified that, during one evening in late January 1987, two men carrying machine guns and wearing handkerchiefs to conceal their faces, approached his family's home. Pet. App. at 6a-7a; Respondent's Appendix at 4a-6a (hereinafter Res. App.). These masked men identified themselves as members of the anti-government guerrillas and tried to pressure Elias-Zacarias and his parents into joining their revolutionary movement. Pet. App. at 7a; Res.

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[3] 8 U.S.C. § 1101(a)(42)(1988).

App. at 5a. Elias-Zacarias refused to take up their cause. Pet. App. at 7a; Res. App. at 5a. As they left, the guerrillas told him "to think it [over] well" and that they would return. Pet. at App. 7a; Res. App. at 5a. Finally, Elias-Zacarias testified that, out of fear that the guerrillas would return and "take him" and "kill him," he left his family home and fled Guatemala. Res. App. at 5a. Elias-Zacarias' testimony was not disputed.

The Immigration Judge's Decision. The Immigration Judge believed Elias-Zacarias' testimony, saying that she found him to be a credible witness. Pet. App. at 41a. Despite finding that Elias-Zacarias was genuinely afraid of the guerrillas, however, she denied his application for asylum and withholding of deportation on two grounds. First, she implied that the guerrillas' threat was not sufficiently individualized to constitute persecution, saying that forced recruitment was something "experienced by other Guatemalans." *Id.* at 41a. Second, the Immigration Judge found that, since there was no evidence that the guerrillas had returned to his parents' home, Elias-Zacarias had not established that the guerrillas would seek him out for retribution. *Id.* at 42a. Petitioner distorts the record, therefore, when it suggests that the Immigration Judge's ruling was based on a finding that: (1) Elias-Zacarias had not been threatened when the guerrillas confronted his family, and (2) the guerrillas' effort to recruit him into their movement was not politically motivated.[4] Pet. Br. at 3.

The BIA's Denial of Elias-Zacarias' Application. On appeal, the BIA initially sought some procedural ground on which to avoid reaching the merits of the Immigration Judge's decision. To begin, the BIA summarily dismissed his initial appeal because it found that trial

[4] Indeed, petitioner's description of the Immigration Judge's decision is not even consistent with that set out by the BIA when addressing Elias-Zacarias' motion to reopen. *See* Pet. App. at 31a.

counsel failed to file a timely brief.[5] Pet. App. at 38a. Subsequently, the BIA denied Elias-Zacarias' motion for a rehearing, saying that it was actually a motion to reopen and no new evidence had been submitted. *Id.* at 35a. However, after Elias-Zacarias filed a motion to reopen and submitted additional evidence indicating that the guerrillas had returned to his home, the BIA finally addressed the merits of his claim. *Id.* at 27a-33a.

In denying Elias-Zacarias' application for asylum and withholding of deportation, the BIA held that, despite his credible testimony concerning his fears that the guerrillas would "take him," there was no evidence that the guerrillas generally engaged in forced recruitment and, consequently, there was no objective basis for his fear that they would kidnap or kill him. *Id.* at 32a. Subsequently elaborating on this conclusion, the BIA recognized the guerrillas' political motives for attempting to recruit Elias-Zacarias. The BIA said:

> In this case, the *guerrillas wanted [Elias-Zacarias] to join them*, and according to [his] father, even offered to pay [Elias-Zacarias] for his services. In [his] brief in support of his latest motion, he acknowledges that the subsequent visits by the guerrillas were also an attempt to recruit him in order for him to assist the guerrillas in *their attempt to violently overthrow the Guatemalan Government*. It can hardly be said that the guerrillas, in any of their visits, sought to harm [Elias-Zacarias] for having opinions they found offensive. . . . In the case now before us, [Elias-Zacarias] has not shown that any threats were directed towards him by the

[5] In its decision on the merits, the BIA admitted that it might have been responsible for his failure to file a brief, saying that there was no reason to disbelieve the sworn statement of Elias-Zacarias' trial counsel that the clerk for the BIA had misinformed her of the filing date. Pet. App. at 28a.

> guerrillas, only that *he was approached by them and asked to join.*

Id. at 32a-33a (emphasis added).

As the foregoing passage indicates, the BIA decision rests firmly on a finding that the guerrillas had not threatened Elias-Zacarias with forced recruitment when they approached his family's house. The BIA simply did not find, as petitioner would have the Court believe (Pet. Br. at 3), that Elias-Zacarias had failed to demonstrate that the alleged persecution was on account of political opinion. Indeed, it is significant that petitioner did not even raise that argument when initially defending the BIA's ruling in the Ninth Circuit.[6]

The Ninth Circuit's Decision. In holding that Elias-Zacarias had presented sufficient evidence to establish an entitlement to refugee status,[7] the Ninth Circuit applied the two-pronged test for demonstrating a "well-founded fear of persecution" that was adopted by this Court in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440-441 (1987). Under this well-accepted and often-applied test, the asylum applicant must demonstrate: (1) a genuine fear of

[6] This is not particularly surprising since a long line of Ninth Circuit opinions has held that, under circumstances like those found in this case, forced recruitment by a guerrilla organization can provide the basis for a claim of persecution on account of political opinion. *See, e.g., Maldonado-Cruz v. INS*, 883 F.2d 788, 791 (9th Cir. 1989); *Arteaga v. INS*, 836 F.2d 1227, 1232 (9th Cir. 1988); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1984); *McMullen v. INS*, 658 F.2d 1312, 1315 & n.2 (9th Cir. 1981).

[7] At the urging of petitioner's appellate counsel, the Ninth Circuit treated the BIA's ruling as both an affirmance of the Immigration Judge's decision on the merits of Elias-Zacarias' asylum application and a denial of his motion to reopen. Pet. Br. at 6. Consequently, when addressing the merits of the asylum application, the panel limited its review to the evidence presented to the Immigration Judge. Pet. App. at 6a & n.2.

persecution on account of "race," "religion," "nationality," "membership in a particular social group," or "political opinion," and (2) an objective basis for that fear. *See id.*

The Ninth Circuit found that Elias-Zacarias' testimony before the Immigration Judge met the first prong of this test. The panel noted that the BIA had not disturbed the Immigration Judge's finding that Elias-Zacarias had testified credibly that, as a consequence of his refusal to join the guerrillas in their efforts to overthrow the Guatemalan government, he was afraid that the guerrillas would return and kidnap or kill him. Pet. App. at 7a & n.3. The panel continued:

> There is no dispute that Elias' fear of persecution was genuine and that he thus satisfied the subjective test for eligibility for asylum. . . . *The dispute is over whether he satisfied the objective test and showed there was a reasonable possibility that the guerrillas would forcibly recruit him.*

Id. at 16a (emphasis added).

In addressing this second prong of the *Cardoza-Fonseca* test, the court of appeals began by pointing out that the BIA's "crucial error was its conclusion that the Guatemalan guerrillas do not engage in forced recruitment." *Id.* The panel then considered the significance of the State Department's advisory letter on Elias-Zacarias' application for asylum.[8] Although the State Department rejected Elias-Zacarias' application on the ground that forced recruitment by a guerrilla group does not entitle an applicant to asylum status,[9] the panel concluded that

[8] The Immigration Judge and the BIA both failed to analyze the State Department letter when addressing the merits of Elias-Zacarias' application.

[9] With respect to the State Department's letter, the panel found that the BIA had erred, as a matter of law, because it had failed to recognize that, since the guerrillas lacked legitimate authority

the letter did constitute "proof that the guerrillas do engage in forced recruitment." [10] *Id.*

Once it concluded that there was objective evidence that the guerrillas engaged in the practice of forced recruitment, the panel found that: (1) the BIA's failure to consider the significance of the State Department letter meant that it did not appreciate the threatening nature of the guerrillas' statement that Elias-Zacarias and his family should "think it [over] well" about joining the revolutionary movement; and (2) as a result, there was a reasonable basis for Elias-Zacarias' fear of being kidnapped or killed for refusing to join the guerrillas in their efforts to overthrow the government in Guatemala. *Id.* at 16a-17a. The panel found the undisputed evidence that the guerrillas carried machine guns and wore masks lent further credence to Elias-Zacarias' belief that he was being threatened.[11] *Id.* at 17a.

The Ninth Circuit then addressed the Immigration Judge's concern that, in this case, the guerrillas' failure to return to Elias-Zacarias' home indicated that they

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to conscript persons into their movement, their efforts to recruit Elias-Zacarias could constitute persecution. Pet. App. at 12a & n.6.

[10] In addition, the Ninth Circuit also called attention to a State Department report written in February 1990 saying, *inter alia*:

> [T]he communist guerrillas increased their campaign of violence, which included destruction of public and private property, robbery, *forced recruitment and labor*, murder, and indiscriminate use of land mines.

Department of State, *Country Report on Human Rights Practices for 1989*, 101st Cong., 2d Sess. 597 (Joint Comm. Print 1990) (emphasis added).

[11] The panel also took special note of the fact that, at oral argument, "the lawyer for the INS indulged in the wholly unwarranted speculation that the guerrillas wore handkerchiefs not to conceal their faces but 'because it might have been dusty that day.'" Pet. App. at 17a & n.8.

were not interested in seeking him out for reprisals. The panel said that, even though Elias-Zacarias was not harmed during the two-month period during which he was preparing to leave Guatemala, this evidence was of "marginal probative value" because of the relatively short period of time involved. *Id.* The panel continued that the evidence showed the guerrillas did, in fact, engage in the practice of forced recruitment, and that they knew where Elias-Zacarias and his family lived so they could carry out their threat. *Id.* at 17a-18a. It concluded, therefore, that the guerrillas had the will and ability to kidnap or kill Elias-Zacarias in retaliation for his refusal to join their movement. *Id.*

Finally, the Ninth Circuit turned to the question of whether the evidence established that the guerrillas had political motives for threatening Elias-Zacarias. Pet. App. at 17a. The panel first considered whether there were any other possible motives for the guerrillas' threats. It determined that there was no evidence that the individual guerrillas at Elias-Zacarias' door had any personal quarrel with him or his family (Pet. App. at 18a), and that the government had not otherwise presented evidence indicating that it was inappropriate to employ the "common sense inference" that the guerrillas' interest in recruiting Elias-Zacarias was to "further the group's political goals." *Id.* The court of appeals concluded, therefore, that the evidence established that there was a reasonable possibility that the guerrillas would return to take Elias-Zacarias by force and, as a result, the BIA's decision denying his asylum application was not substantially reasonable. *Id.*

REASONS WHY THE PETITION SHOULD BE DENIED

I. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER IS ASKING THIS COURT TO SECOND-GUESS PROPER INFERENCES THE NINTH CIRCUIT DREW FROM THE FACTS IN THE RECORD.

On a number of occasions, this Court has said that the granting of certiorari is not appropriate in cases where the lower court's determination turns, as here, on an evaluation of specific facts in the record. *See, e.g., NLRB v. Hendricks County Rural Elec. Corp.*, 454 U.S. 170, 176 n.8 (1981). In this case, there can be no doubt that petitioner is asking the Court to grant certiorari to second-guess the evidentiary conclusions of the court of appeals concerning the guerrillas' motives for threatening Elias-Zacarias. Indeed, petitioner's brief makes it quite clear that its request for certiorari ultimately rests on the argument that the Ninth Circuit acted inappropriately when it *inferred* that the guerrillas were motivated by political purposes. Pet. Br. at 14-16.

Although petitioner tries to transform this essentially factual dispute into a legal claim by suggesting that the Ninth Circuit had created a presumption in favor of an asylum applicant that alleges persecution by a guerrilla group (Pet. Br. at 16), petitioner does not say, nor could it say, that the Ninth Circuit has established an irrebuttable presumption that a threat by a guerrilla will be viewed as politically motivated even when the evidence indicates otherwise. In fact, a review of the Ninth Circuit's decisions demonstrates that it examines, on a case-by-case basis, the circumstances surrounding an alleged confrontation between an asylum applicant and guerrillas in order to determine whether any threats or acts of violence were politically motivated. Indeed, on a number of occasions, the Ninth Circuit has *upheld* BIA decisions rejecting an alien's request for asylum on the ground that the evidence concerning the initial confrontation reasonably supported a finding that the guerrillas' motives for threatening the alien were not political.

For example, in *Rodriguez-Rivera v. INS*, 848 F.2d 998 (9th Cir. 1988), the Ninth Circuit was confronted with evidence that a particular guerrilla had threatened to kill the applicant for asylum. Notwithstanding the fact that two other guerrillas were present when the threat was made, the Ninth Circuit found that the evidence did not reasonably support the conclusion that the threat was politically motivated. The applicant had not testified, or even implied, that the other guerrillas had any interest in killing him, that they had any interest in pursuing him, or that they knew where he lived. *Id.* at 1006. In these circumstances,[12] the Ninth Circuit concluded that the threatening guerrilla was merely expressing his personal desire to kill the applicant, unaccompanied by any political motive. Consequently, it upheld as substantially reasonable the BIA's finding that the threat was not made to advance the political aims of the guerrilla movement.[13] *Id.* at 1006-07.

The issue raised by this certiorari petition thus boils down to whether the evidence in this case supports the inference that the guerrillas were politically motivated when they threatened Elias-Zacarias. In this regard, petitioner's attack on the Ninth Circuit's factual determinations is based on the often-repeated cant that the evidence merely established that Elias-Zacarias was refusing to join "someone's army" and "fight for them," and there-

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[12] The panel, when describing the *Rodriguez-Rivera* decision, specifically mentioned that asylum cases involving allegations of threats by guerrilla groups often require the reviewing court to draw inferences from the facts in the record to determine whether the BIA's decision is substantially reasonable. Thus, the panel said: "[T]he testimony countering the ordinary inference that Salvador, as a guerrilla, was threatening Rodriguez-Rivera in order to carry out the goals of the guerrillas (as opposed to his own personal goals) was crucial to the outcome of that case." Pet. App. at 14a.

[13] *See also Florez-De Solis v. INS*, 796 F.2d 330 (9th Cir. 1986) (despite some threats by guerrillas against the life of Florez-De Solis, the Ninth Circuit inferred from the evidence that the threats were either examples of random violence in El Salvador or an effort to collect a debt from a former employer of Florez-De Solis).

fore the motive for forcibly recruiting him does not constitute persecution on account of political opinion. Pet. Br. at 3, 17. The credible and undisputed testimony at the hearing concerning the circumstances surrounding Elias-Zacarias' confrontation with the guerrellias, however, fully supports the Ninth Circuit's ruling, notwithstanding petitioner's *ex post facto* attempt to prop up the BIA's decision.[14]

When describing this confrontation, Elias-Zacarias testified:

> [The guerrillas] came over and they said . . . then my parents came out and they asked [the guerrillas] who they were looking for . . . and [the guerrillas] asked *us if we wanted to join them.* Then we said, no. And, [the guerrillas] insisted why *we didn't want to join them.* And, [the guerrillas] said that the guerrillas were good, but *we didn't want to* . . . and they said that they were coming back.

Res. App. at 5a (emphasis added). Later in the hearing, in response to cross examination by petitioner's trial counsel, Elias-Zacarias reaffirmed that the guerrillas were interested in recruiting his entire family into their revolutionary movement. *Id.* at 9a.

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[14] With respect to petitioner's argument that the BIA's decision was entitled to heightened deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984) (Pet. Br. at 19-20), neither the Immigration Judge nor the BIA based its denial of Elias-Zacarias' application on a finding that the guerrillas lacked a political motive. In addition, the BIA has been inconsistent with respect to when the refusal to perform military service satisfies the statutory requirement for refugee status, concluding on a number of occasions that threats of punishment directed at an asylum applicant for refusing to join *someone's army* was persecution on account of political opinion. *See Matter of A.G.*, Int. Dec. 3040 (BIA 1987); *In re Salim*, 18 I&N Dec. 311 (BIA 1982); *In re Noory*, BIA unpublished dec. No. A24 001 415 (argued Oct. 28, 1985); *In re Momen*, BIA unpublished dec. No. A27 026 208 (argued Oct. 10, 1985). In circumstances like these, this Court has said that a reviewing court need not defer to an agency's determination. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-47 n.30 (1987).

This evidence undercuts petitioner's claim that the guerrillas only wanted to recruit *apolitical* fighters for their army.[15] Certainly, it would not make sense for a guerrilla group to recruit Elias-Zacarias' middle-aged parents into their guerrilla movement if their only motive was to recruit individuals to fight in their army.[16] To the contrary, the evidence supports the Ninth Circuit's "common-sense inference" that, in this case, the guerrillas had political motives when they confronted Elias-Zacarias about joining their movement aimed at overthrowing the Guatemalan government.[17]

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[15] According to Ernesto "Che" Guevara, an influential Latin American revolutionary theorist who began his revolutionary career in Guatemala (*see* Regis Debray, *The Revolution on Trial* 269-270 (1977)), guerrilla movements should subject a new recruit to political indoctrination. For example, Che Guevara wrote: "The education of the guerrilla fighter is important from the very beginning of the struggle. This [education] should explain to them the social purpose of the fight and their duties, clarify their understanding, and give them lessons in morale that serve to forge their characters." *See* Che Guevara, *Guerrilla Warfare* 102 (1985).

[16] Even if this were their only motive, Che Guevara has said that guerrilla warfare "is politico-military" and it "is in this manner that it must be developed, and consequently, understood." *See* John Gerassi (ed.), *Venceremos! The speeches and writings of Ernesto Che Guevara* 277 (1968).

[17] Che's Guevara's writings on guerrilla warfare also provide support to the Ninth Circuit's "common-sense inference." In this regard, he wrote:

> Indoctrination should be continuous, and so should the struggle for unity of the workers, of the peasants, and of the other social classes that live in the zone, in order to achieve towards the guerrilla fighters a maximum homogeneity of attitude. This task with the masses, this constant work at the huge problem of relations of the guerrilla band with the inhabitants of the zone, must also govern the attitude taken toward the case of an individual recalcitrant enemy soldier: he should be eliminated without hesitation when he is dangerous. In this respect the guerrilla band must be drastic.

Guerrilla Warfare at 75.

II. NO CONFLICT PRESENTLY EXISTS BETWEEN THE NINTH AND ELEVENTH CIRCUITS WITH RESPECT TO WHETHER FORCED RECRUITMENT BY GUERRILLA GROUPS CONSTITUTES PERSECUTION ON ACCOUNT OF POLITICAL OPINION.

Petitioner also suggests that a conflict exists between the Ninth and Eleventh Circuits concerning the evidence necessary to establish entitlement to asylum when an applicant claims that he was threatened with violent retaliation for refusing to join a guerrilla group. Pet. Br. at 9-10. In support of this branch of its argument, petitioner points to the Eleventh Circuit's decision in *Perlera-Escobar v. Executive Office for Immigration*, 894 F.2d 1292 (11th Cir. 1990), saying that the court's ruling in that case is in conflict with the Ninth Circuit's decision here. Pet. Br. at 10. A review of that Eleventh Circuit opinion demonstrates, however, that it is clearly distinguishable on its facts and, as a result, no conflict presently exists between the circuits on this point.

In *Perlera-Escobar*, the Eleventh Circuit addressed an application for asylum and withholding of deportation by an individual *who had voluntarily joined a guerrilla band* and subsequently deserted. The Eleventh Circuit's analysis begins by noting that, "[i]n the absence of any evidence that the guerrillas are interested in him for political reasons, the BIA *inferred* from the record that Escobar is nothing more than a deserter." 894 F.2d at 1298 (emphasis added). The opinion continues that the BIA also *inferred* that, as a paramilitary organization, the guerrillas had to punish deserters in order "to maintain order and promote loyalty." *Id.* The *Perlera-Escobar* opinion concludes that, since the guerrillas' interest in the applicant stemmed from their need to preserve unity and order in their ranks, the BIA acted in a substantially reasonable fashion when it found that the threat of retaliation by a guerrilla group against a deserter did not constitute persecution on account of political opinion. *Id.*

Despite petitioner's assertions to the contrary (Pet. Br. at 13), the facts of *Perlera-Escobar* have no relevance to this case. Unlike *Perlera-Escobar*, where a single male had *volunteered for military service* with the guerrillas, Elias-Zacarias' entire family was threatened as a result of their collective refusal to join in the guerrillas' efforts to overthrow the Guatemalan government. In addition, there is absolutely nothing in the record suggesting that Elias-Zacarias ever indicated a willingness to join the guerrillas' revolutionary movement,[18] or that he otherwise knew anything that would cause them to consider him a threat to the effectiveness of their fighting force. In these circumstances, it would be inappropriate to infer, as the BIA did in *Perlera-Escobar*, that the guerrillas' threat against Elias-Zacarias was motivated by a desire to maintain order and unity within the ranks of the guerrillas' movement.

In addition, petitioner is wrong when it asserts that the alleged conflict between the Ninth and Eleventh Circuit is reflected in their differing treatment of the decision in *Maldonado-Cruz v. INS*, 883 F.2d 788 (9th Cir. 1989). Pet. Br. at 13 & n.5. In fact, these circuits' differing approaches to the *Maldonado-Cruz* case merely reflects that case's unique facts, which presented a close factual question with respect to whether Maldonado-Cruz was a deserter or an innocent victim of forced recruitment by a guerrilla band.

Maldonado-Cruz claimed that the guerrillas had forced him to join their movement and had subjected him to two days of political indoctrination before he escaped. *See Maldonado-Cruz v. INS* 883 F.2d at 789. The BIA treated Maldonado-Cruz as a deserter from a guerrilla organization and, consequently, ruled that the guerrillas'

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[18] The Eleventh Circuit recognized exactly this distinction when it noted that, unlike the *Maldonado-Cruz* case, the record clearly established that Perlera-Escobar was not dragooned by the guerrilla. *See Perlera-Escobar v. INS*, 894 F.2d at 1297 & n.4.

motives were not political, but based on a desire to maintain unity and discipline within the guerrilla movement. *See In re Maldonado-Cruz*, Int. Dec. 3041, at 10 (BIA 1988). On appeal, the Ninth Circuit viewed the factual record in a different light, concluding that, since the guerrillas initially had forcibly recruited Maldondo-Cruz into their movement, he was not a deserter and their efforts to inflict physical harm on him constituted persecution on account of political opinion. *See Maldonado-Cruz v. INS*, 883 F.2d at 791.

Therefore, when the *Perlera-Escobar* court said that it found the BIA's decision in *Maldonado-Cruz* to be "persuasive and a statement of the BIA's position," [19] it was simply saying that, in a deserter case, it was appropriate to infer that threats of retaliation by a guerrilla group are motivated by a desire to maintain unity and order, not hostility to the political views of the applicant for asylum. In addition, since the Eleventh Circuit took care to distinguish the facts of *Perlera-Escobar* from *Maldonado-Cruz*, [20] it clearly left open the question of what inferences it might draw in a case where an asylum applicant alleged that a guerrilla group threatened violence in retaliation for his or her refusing to join their revolutionary movement. The alleged conflict between the circuits upon which the petition is based thus turns out to be two decisions based on materially different factual records, from which the two circuits drew different inferences concerning the motivations of the guerrillas who were threatening violence against the asylum applicant. No conflict in fact exists.

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[19] *See id.*

[20] *See id.*

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES E. COLEMAN, JR.
PETER A. VON MEHREN *
NANCY L. MANZER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Counsel for Respondent

* Counsel of Record

April 19, 1991

APPENDIX

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Phoenix, Arizona

File No.: A 27 926 183

In the Matter of:
JAIRO JONATON ELIAS-ZACARIAS,
Respondent

December 4, 1987

IN DEPORTATION PROCEEDINGS

Transcript of Hearing

CHARGE: Section 241(a)(2)—entered without inspection.

APPLICATION: Political Asylum, withholding of deportation, and in the alternative, voluntary departure.

ON BEHALF OF RESPONDENT:

Juan Rascon
Central American Refugee Project
6802 S. 24th Street
Phoenix, Arizona 85040

ON BEHALF OF SERVICE:

Linda Boone
Trial Attorney
230 N. First Avenue
Phoenix, Arizona 85025

JUDGE FOR THE RECORD

This is Immigration Judge Irene Weiss in Phoenix, Arizona on December 4, 1987 conducting a deportation hearing in the matter of Jairo Jonaton Elias-Zacarias, A 27 926 183. Respondent is represented by one Juan Rascon. The Service is represented by Linda Boone, and the interpreter is Marlyn Maraboli interpreting in the Spanish language.

JUDGE TO MR. ELIAS

Q. What is your true and correct name?
A. Jairo Jonaton Elias-Zacarias.
Q. All right. The interpreter will translate English to Spanish for your benefit. You are here today with Juan Rascon, does he represent you in these proceedings?
A. Yes.

JUDGE TO MR. RASCON

Q. Mr. Rascon, it should be noted for the record that you are the Director of the Central American Refugee Project, is that correct?
A. That's correct.
Q. And, I have an Order to Show Cause issued July 12th 1987, do you concede service?
A. Yes, I do.
Q. We will mark that as Exhibit 1. And, do you waive a reading and an explanation of the rights to the respondent?
A. Yes, I do.
Q. And, are you prepared to plead to the allegations and charge contained on the Order to Show Cause?
A. Yes, Your Honor, respondent admits and concedes the allegations contained on the Order to Show Cause.
Q. Thank you. And, are you designating a country?
A. We reserve designation of a country, Your Honor.
Q. All right. I will direct Guatemala since the respondent is a native and citizen of Guatemala. And, the relief your requesting?

A. We're seeking asylum and withholding of deportation.
Q. And, are you seeking voluntary departure in the alternative?
A. Yes. In the alternative.
Q. We will admit the application for asylum as Exhibit 2 and the State Department letter as Exhibit 3 and were there any other preliminary matters?
A. Your Honor, I would like to submit a packet of background documentary information. This application we recently made the commitment of the respondent to represent him, so we had not done so previously. So, I'll serve the Government and court with a copy.
Q. I'll mark that as Exhibit 4.

JUDGE TO MR. ELIAS

Q. Will the respondent please stand and raise his right hand to be sworn. Do you solemnly swear that the testimony you will give at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?
A. Yes.
Q. Thank you. Please be seated.

MR. RASCON TO MR. ELIAS

Q. Mr. Elias, how old are you?
A. Nineteen.
Q. And, where are you from?
A. Guatemala.
Q. What city in particular?
A. Orientapeca (phonetic sp.).
Q. And, when did you leave Guatemala?
A. At the end of March.
Q. Of this year?
A. Yes. Of this year.

Q. And, why was it that you left Guatemala?
A. Simply because of the problem that . . . the guerrillas came over to my house.
Q. And, when did this happen?
A. That happened at the end of the month of January.
Q. That was this year?
A. Yes, this year.
Q. And, who were these individuals, do you know?
A. No, I don't know. They were two persons.
Q. Do you know what organization they represent?
A. They didn't . . . they didn't let us know what organization they belonged to, but they only . . . I only know that they were guerrillas.
Q. Did they . . . excuse me . . . did they tell you that they were guerrillas?
A. Yes, they told me.
Q. And, how many of them were there?

MS. MARABOLI TO MR. RASCON

Could you repeat that please.

MR. RASCON TO MR. ELIAS

Q. How many of them were there?
A. There were two.
Q. Were they armed?
A. Yes, they were armed.
Q. Were they uniformed?
A. Yes.
Q. What kind of uniform did they have?
A. They had a military uniform.
Q. Did they wear anything else of distinction?
A. Yes, they had handkerchiefs on their mouth.
Q. So they had part of their face covered?
A. Covered, yes.
Q. What time of day did they come to your house?
A. It was around Tuesday.

Q. What time?
A. It was around 6:30 in the afternoon.
Q. Was it still light out or was it dark?
A. No. It was getting dark.
Q. How did you notice . . . or how did they arrive at your house?
A. They came over and they said . . . then my parents came out and they asked them who they were looking for . . . and they asked us if we wanted to join them. Then we said, no. And, they insisted why we didn't want to join them. And, they said that the guerrillas were good, but we didn't want to . . . we didn't want to and they said that they were coming back. That we'd better think it well, and then they left.
Q. Just why didn't you want to join the guerrillas?
A. Because they see very well, that if you join the guerrillas . . . then you are against the government. You are against the government and if you join them then it is to die there. And, then the government is against you and against your family.
Q. So, were you afraid to join the guerrillas?
A. I was afraid to join the guerrillas, yes.
Q. So, after this visit by the guerrillas what did you do?
A. I remained there for some time and then I came here.
Q. What did you do during the time that you remained there?
A. Nothing. Because they said that they were coming back.
Q. Did you continue to work?
A. Yes, I was working.
Q. When did you leave Guatemala?
A. At the end of March.
Q. Just why did you decide to leave Guatemala?
A. Simply because I was afraid and I was thinking that they were coming back and that they could take me and kill me.

Q. Do you have any idea what would have happened to you if they would have returned and found you again?

MS. BOONE TO JUDGE

Objection, Your Honor, speculative.

JUDGE TO MR. RASCON

Sustained.

MR. RASCON TO MR. ELIAS

Q. When you decided to leave who did you talk this decision over with?
A. With my parents.
Q. What did they tell you? What advice did they give you?
A. That it would be better if I abandoned the country.
Q. Did they tell you why it would be better?
A. Yes. So, I don't join the guerrillas and I won't be against the government.
Q. Are you still afraid to return to Guatemala?
A. Yes.
Q. Could you explain to the court why you're afraid?
A. Simply . . . as soon as I get there to Guatemala . . . these people can come back. Maybe to take me or kill me.
Q. You said that these guerrillas were armed?
A. Yes.
Q. Did you see what kinds of weapons they had?
A. I only saw that they were machine guns.
Q. Did they ever point those weapons at you?
A. No.
Q. So, they didn't threaten you with these weapons?
A. No.
Q. When you left your home town of Orientapeca?
A. The same day like two days before.
Q. When you left Orientapeca where did you go?
A. I came to Mexico.

Q. How did you travel from your hometown to Mexico?
A. By bus.
Q. Did you obtain documents for you to leave Guatemala?
A. No documents . . . no personal documents.
Q. So you didn't obtain a passport or any type of permission to leave Guatemala?
A. No.
Q. And, why not?
A. Because of lack of money. It was easier for me to leave without papers.
Q. When you got to the border of Mexico and Guatemala, did you present yourself to the authorities at the border?
A. No.
Q. So, you didn't talk to any of the authorities at the border?
A. No.
Q. So how did you cross into Mexico?
A. From one of side of Immigration.
Q. So you went around them?
A. Just like . . . let's say through the mountains, through the hills.
Q. Did you obtain permission to remain in Mexico?
A. No.
Q. So, the whole time you were in Mexico you were there illegally?
A. Yes.
Q. Are you now in time to return to Mexico?
A. Yes.
Q. Do you have the legal rights?
A. No.
Q. Okay.

MR. RASCON TO JUDGE

That's all the questions regarding asylum, Your Honor. I would like to ask him regarding voluntary departure.

MR. RASCON TO MR. ELIAS

Q. Mr. Elias, if it were necessary, could you afford the transportation to leave the United States?

A. Yes.

Q. Do you have the money?

A. No. But I could get it maybe with my cousin.

Q. Have you ever been convicted or arrested for any crime anywhere in the world?

A. No.

Q. Have you ever been deported from the United States?

A. No.

Q. And, if it were necessary would you obey the Judge's order to return voluntarily?

A. Yes.

MR. RASCON TO JUDGE

I'm sorry. One other question regarding the asylum matter. I'm sorry.

MR. RASCON TO MR. ELIAS

Q. Why didn't you relocate to another part of Guatemala after the incident with guerrillas in January?

A. Simply because in other places I don't have family and if you go to another place they look at you strange there and they think that you are something with the guerrillas.

MR. RASCON TO JUDGE

That's all, Your Honor.

JUDGE TO MS. BOONE

Q. You may cross-examine?

A. Thank you.

MS. BOONE TO MR. ELIAS

Q. When the guerrillas came to your house who was present?

A. My father and my mother and myself.

Q. None of your brothers were there?

A. No.

Q. And, the guerrillas were questioning you . . . were they also questioning your parents?

A. Yes.

Q. Were they also asking your parents to join them?

A. Excuse me?

Q. Were they also asking your parents to join them?

A. Yes.

Q. Do they know of your brothers?

A. No.

Q. Did they know you or your parents personally?

A. I don't think so.

Q. Have they ever come to your house before?

A. No.

Q. Have you ever had any contacts with your parents since you left Guatemala?

A. Yes.

Q. Have you parents or your brothers been threatened since you left Guatemala?

A. No.

Q. Did any . . . what are the ages of your brothers?

A. Actually I don't know . . . I don't have any idea.

Q. Approximately?

A. One is around 22. Another one is 24. Another one is 27. And, the other one is around 33, something like that.

Q. Well, do they all live with your parents in the same house?

A. No.

Q. Do they live in the same area?

A. Yes.

Q. Do you parents live alone?

A. Yes.

Q. And, I correct that your brothers have not been recruited by the guerrillas?

A. No.

Q. You told the Judge that you had a cousin in the United States?

A. Yes.

Q. Did this cousin encourage you to come to the United States?

A. No.

Q. Do you recall when you were taken into custody by the immigration?

A. Yes.

Q. At the time were you questioned by an immigration officer?

A. I don't understand.

Q. When you were taken into custody by the United States Immigration Service, were you not questioned at that time about your entrance into the United States?

A. Yes.

Q. And, did you not tell an officer that your cousin had told you about the United States?

A. No.

Q. Did you tell that officer that you came here to try to get a better job?

A. Yes.

Q. When you were working . . . for the month of March of this year, is this the place where you had been working before?

A. Yes.

Q. And, then you left the country at the end of March, did you have any problems getting out of the country?

A. No. I did not have problems.

Q. Did any guerrilla or government authorities question you?

A. No.

Q. Is it true that you had no problems between the end of January and the end of March when you left Guatemala?

A. Only when the guerrillas came at the end of January.

Q. But from the time that the guerrilas came at the end of January, until you left the country at the end of March, were there any guerrillas or government authorities that bothered you?

A. Not to me.

Q. Do you know where your cousin in the states lives?

A. Yes.

Q. And, do you know what his status is in the country?

A. No.

Q. Do you know if he has a job?

A. No. I don't know.

Q. Have you had any contact with him since you've been here in the United States?

A. Yes.

Q. And, has he expressed to you he would assist you financially if you needed the money?

A. Yes, but he tells me that he cannot help me.

Q. And, le'ts just clarify for the Judge . . . if the Judge is to grant you what is called voluntary departure, you will have to pay our own way back to Guatemala?

A. Yes.

Q. Will your cousin be able to help you pay your way?

A. Possibly.

MS. BOONE TO JUDGE

I have nothing further, Your Honor. At this time the Service would like to offer to the court the certified copy of the I-213 that was prepared in Mr. Elias' case and am serving a copy of that on Mr. Rascon at this time, and I I'd also like to offer, and ask the court to mark for identification, three newspaper articles from the Arizona Republic which give information on the most current conditions in Guatemala since leading up to the recent peace plan which was signed in Guatemala City.

JUDGE TO MS. BOONE

Q. This is supposed to be letter size.
A. I did reduce it from a page size. I apologize if it's supposed to be an 8-½ X 11.

JUDGE TO MR. RASCON

Q. Mr. Rascon, do you have any objection to the I-213?
A. No, Your Honor.
Q. We will mark it as Exhibit 5 and 6, respectively. Mr. Rascon, do you have any redirect?
A. Yes, just one question, Your Honor.

MR. RASCON TO MR. ELIAS

Q. Besides your cousin, has anyone else offered to help you?
A. Yes.
Q. Do you know what that person does for a living?
A. Work.
Q. But do you know his occupation?
A. No.
Q. How did you meet this person?
A. He was at the detention center where I was.
Q. So, did he offer you any type of help?
A. Yes. Monetary help.

MR. RASCON TO JUDGE

Nothing further, Your Honor.

JUDGE TO MR. RASCON

Q. All of the information that you submitted . . . the documentation . . . is of a general nature. None of that is referring to the respondent, is that correct?
A. All of it is background information. It does not name the respondent by name.

Q. Do you have any other witnesses?
A. No, Your Honor.
Q. Would you want to make a closing statement?
A. The respondent waives closing argument, Your Honor.
Q. Okay.

JUDGE TO MS. BOONE

Q. Does the Service want to make a closing statement?
A. Just briefly, Your Honor. It's the Service's position that under the guidelines of *Matter of Mojarabi* and *Inez vs. Cardoza-Fronseca* the respondent has failed to establish a well-founded fear of persecution. He had only one visit by alleged guerrillas at the end of January 1987 who threatened allegedly himself and his parents. However, his testimony doesn't establish that they were actually threatened. If I remember correctly he said that they asked his family to consider joining them. That they had better think about it, and that they would possibly come back and yet the respondent continued to work up until the end of March which would have been a period of approximately two months and continued living at home and has had contact with his family and they have not had any threats. Apparently, the guerrillas have not come back to the lcoation, and therefore there has been no showing that the persecutor has either the inclination or the capability of punishing or attempting to overcome a idea, belief, or characteristic that Mr. Elias would possess and I would submit therefore that he has not established a well-founded fear of persecution which would be required for a grant of asylum and withholding of deportation.

MR. RASCON TO JUDGE

Q. Your Honor, respondent's testimony has been credible, honest, and consistent with the I-589 and his testi-

mony today . . . his fear is an objective one based an incident that occurred in January 1987. As best as the respondent knows, those individuals could still return to his home and could still attempt to obligate or force the respondent to join the guerrillas. The respondent was very clear in that he does not desire to join the guerrillas and it is his fear that the guerrillas would therefore persecute him or kill him. The respondent is very clear in that he does not wish to serve the guerrillas, in view of the fact that if he did so the government would in turn persecute him and possibly his family. So, his case today is based on that fear. That if he continues to avoid the guerrillas that he would suffer persecution and as well as the fact that if he joined the guerrillas he would also bring upon himself potential persecution from the government as well.

JUDGE RENDERS ORAL DECISION

JUDGE TO MR. RASCON

Q. Mr. Rascon, you've heard my decision, are you reserving?

A. Yes, Your Honor.

Q. As you know, you have ten days in which to file your notice of appeal?

A. Yes, Your Honor.

MS. BOONE TO JUDGE

Q. Service waives.

A. Thank you.

JUDGE FOR THE RECORD

Since there is nothing further at this time, this decision is final. This hearing is closed.

HEARING IS CLOSED